

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SHARIEF ABDUL-WASI KHALIL,
Appellant.

No. 2 CA-CR 2018-0205
Filed October 31, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20161545001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Alexander M. Taber, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 Following a jury trial, Sharief Abdul-Wasi Khalil was convicted of one count each of armed robbery, aggravated assault with a deadly weapon, kidnapping, theft of a means of transportation, and possession of a deadly weapon by a prohibited possessor. The trial court sentenced him to concurrent sentences of 10.5 years' imprisonment. On appeal, Khalil argues the court abused its discretion by denying his motion to sever the prohibited possessor count from the remaining charges. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Khalil's convictions. *State v. Wright*, 239 Ariz. 284, ¶ 2 (App. 2016). In 2015, Khalil came to J.E.'s used-car business looking for a job. J.E. declined to hire him but offered Khalil \$100 for any referral who purchased a vehicle, and he allowed Khalil to use the office to make phone calls to potential referrals.

¶3 On March 28, 2016, Khalil informed J.E. that he had a customer, but no one showed up. J.E. then told Khalil they could meet when the customer could make it to the dealership. The next morning Khalil entered the office wearing gloves, and J.E. asked if the potential customer was coming in. Khalil drew a gun from his backpack and pointed it at J.E., demanding "everything you got in your pocket." J.E. said he had no cash and offered a check for \$3,000, to which Khalil agreed. Khalil instructed J.E. to write "car down payment" on the check's memo line.

¶4 After taking the check, Khalil demanded a vehicle from the lot. He walked J.E. to the safe box where the keys to the vehicles were kept while pointing the gun at J.E.'s back. He then held the gun inside his backpack, still pointed at J.E., as they walked onto the car lot to the vehicle. After starting the car, they returned to the office and, displaying the gun

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again, Khalil told J.E., “[I]f you call the police, I’m going to kill you.” J.E. asked Khalil his plans for the car, and Khalil replied that after cashing the check he would phone J.E. and tell him where to find it. Khalil then left the office and drove away in the vehicle.

¶5 J.E. immediately telephoned 9-1-1 and then his bank to stop payment of the check. Two detectives arrived, and, while they were speaking with J.E., Khalil phoned J.E. four times, complaining he could not cash the check. Those calls were recorded by the detectives. At the end of the fourth call, J.E. told Khalil he had the money and asked him to come to the car lot to get it. Khalil said, “I’m not coming to you.” “When you finish, you meet me, and you pay me, then [I will] give you your keys.” J.E. agreed to do so.

¶6 Members of a special weapons and tactics (SWAT) unit assembled at the designated meeting place, a fast-food restaurant, and arrested Khalil in the parking lot carrying car keys bearing a yellow tag from J.E.’s dealership. The vehicle was later located a mile-and-a-half from the restaurant. A subsequent search of Khalil’s residence revealed J.E.’s check inside a book, a loaded gun in Khalil’s closet, and a backpack with gloves inside it.

¶7 Khalil was indicted on the counts of conviction as noted above. At trial, the state presented J.E.’s testimony, security video footage from the car lot, and the recorded phone calls. Khalil did not dispute committing the charged acts, but claimed insanity. In support of his defense he called as witnesses his mother, his wife, and a clinical psychiatrist. Khalil’s mother and wife testified to his often strange and erratic behavior after returning from his military service of over three years. They both testified about occasions when Khalil had behaved irrationally, including an incident in November 2015, when he was “screaming at the top of his voice,” pacing back and forth, looking up, and repeating “Allah” over and over, and was eventually arrested and taken to the Pima County Jail.

¶8 After interviews with Khalil and reviewing his medical and numerous psychiatric records, defense expert Dr. Barry Morenz testified that Khalil likely suffered from schizophrenia, was “psychotic” at the time of the offenses, and “met the criteria under Arizona law for being found guilty except insane” for the first four counts.¹ He acknowledged, however,

¹The defense of guilty except insane requires the defense to prove by clear and convincing evidence that the actor was afflicted with a mental

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not having reviewed the video evidence, and conceded Khalil was not “so deprived of reason that he would not know that pointing a gun at someone was wrong.” The state’s expert, Dr. James Sullivan, concurred that Khalil suffered from a psychiatric disorder. But Sullivan disagreed that Khalil met the criteria for a guilty except insane defense, pointing to certain aspects of his conduct during the sequence of events surrounding the offenses, and stating it was “abundantly clear that Mr. Khalil did indeed know these criminal acts were wrong.”

¶9 The jury found Khalil guilty as charged, and he was sentenced as described above. He timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶10 Before trial, Khalil filed a motion to sever the prohibited possessor count from the other four charges on the ground that evidence of his prior felony conviction, essential for proving the prohibited possessor count, would be “irrelevant, unduly prejudicial, and inadmissible” as to the other counts based on Rules 401, 402, and 403, Ariz. R. Evid. The trial court denied his motion, reasoning that

[t]he experts in the case will need to testify why in their expert opinion it is, or it is not, possible for [Khalil] to meet the criteria under Arizona law for being found guilty except insane on [four counts] but not on . . . the prohibited possessor count, when all counts occurred nearly simultaneously. . . . [I]n these circumstances, it would be improper for the court to sever [the prohibited possessor count] and prevent the jury from learning all the operative facts relied upon by the experts in reaching their conclusions.

Khalil timely renewed the motion at trial. *See* Ariz. R. Crim. P. 13.4(c).

¶11 Rule 13.3(a)(2), Ariz. R. Crim. P., provides that charges may be joined if the separate crimes “are based on the same conduct or are otherwise connected together in their commission.” Under Rule 13.4(a),

disease or defect so severe that he did not know the criminal act was wrong. A.R.S. § 13-502(A), (C).

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however, a motion to sever must be granted if “necessary to promote a fair determination of any defendant’s guilt or innocence of any offense.” We review the denial of a severance motion for abuse of discretion and will reverse only if the defendant shows “compelling prejudice against which the trial court was unable to protect.” *State v. Murray*, 184 Ariz. 9, 25 (1995) (quoting *State v. Cruz*, 137 Ariz. 541, 544 (1983)).

¶12 Citing *State v. Burns*, 237 Ariz. 1 (2015), Khalil argues the trial court erred because his prior conviction was inadmissible, irrelevant, and “bias[ed] the jury against him.” We disagree for several reasons. First, the court correctly determined that the evidence of the prior felony conviction was relevant and admissible as to the remaining four counts as a result of Khalil’s guilty except insane defense. See *State v. Hinchey*, 165 Ariz. 432, 436 (1990) (“Once a defendant raises insanity as a defense, evidence of prior bad acts falls out of the limitations of Rule 404.”); *State v. Amarillas*, 141 Ariz. 620, 623 (1984) (“[W]here insanity is an issue, all prior relevant conduct of the defendant’s life is admissible.”). The court specifically reasoned that the jurors should know the defense expert’s opinion on the prohibited possessor count to assist them in evaluating his opinion on the other counts.

¶13 As for the prejudicial effect of the evidence, although the state referred to Khalil’s prior conviction during closing argument, it did so only generically, briefly, and without emphasis, mentioning it only in the context of the prohibited possessor charge. See *Burns*, 237 Ariz. 1, ¶ 38 (finding severance error harmless when “the State did not emphasize” the prior felony conviction).

¶14 Finally, the jury was properly instructed on how to treat the evidence of Khalil’s prior. Although it was relevant to the experts’ opinions regarding Khalil’s insanity defense, the trial court twice explained that it was to be considered only as proof of an element of the prohibited possessor count and not as evidence of guilt on the other four counts. See *id.* (finding severance error harmless when court properly instructed jury on how to consider evidence); see also *State v. Prince*, 204 Ariz. 156, ¶ 17 (2003) (no prejudice resulting from denial of severance motion when jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt). We conclude Khalil has established neither an abuse of the trial court’s discretion, nor any compelling prejudice.

Disposition

¶15 For the foregoing reasons, Khalil’s convictions and sentences are affirmed.